JOHN R. JOLLEY

IBLA 97-412 Decided July 2, 1998

Appeal from a decision by the Wyoming State Director, Bureau of Land Management, dismissing a protest against an exchange of public for private land. WYW 138764.

Set aside and remanded.

1. Appeals: Standing--Board of Land Appeals--Rules of Practice: Appeals: Standing to Appeal

   Under 43 C.F.R. § 4.410, any party to a case who is adversely affected by a BLM decision has a right to appeal to the Board of Land Appeals. In order to be adversely affected, an appellant must have a legally cognizable interest in the land at issue. That interest need not be an economic or a property interest; use of the land will suffice. A person challenging a decision to complete a multiple parcel exchange need not allege use of each parcel of public land proposed for exchange in order to satisfy the standing requirements of the Board of Land Appeals.

2. Appeals: Standing--Board of Land Appeals--Rules of Practice: Appeals: Standing to Appeal

   When the person appealing a multiple parcel land exchange alleges a life-long pattern of use of various parcels included in the exchange, providing specific examples of such use, such use is sufficient to meet the standing requirements of the Board of Land Appeals.

3. Appraisals--Exchanges of Land: Generally--Federal Land Policy and Management Act of 1976: Exchanges

   Departmental regulation 43 C.F.R. § 2200.0-5(a) defines "appraisal or appraisal report" as "a written statement independently and impartially prepared by a qualified appraiser," and the appraisal of properties involved in

the exchange must be conducted by a qualified appraiser who is competent, reputable, impartial, and has training and experience in appraising property similar to the properties involved in the appraisal assignment.

4. Appraisals--Exchanges of Land: Generally--Federal Land Policy and Management Act of 1976: Exchanges--Words and Phrases

"Impartial." To be "impartial," an appraiser must be "disinterested," i.e., he or she must not be concerned, in respect to possible gain or loss, in the result of the pending proceedings or transactions. He or she may not have any interest in the matter referred to or in controversy; he or she must be free from prejudice or partiality. He or she must be fair minded, without pecuniary interest, not previously interested, and not biased or prejudiced.

5. Appraisals--Exchanges of Land: Generally--Federal Land Policy and Management Act of 1976: Exchanges

An officer or director of a corporation stands in a fiduciary relationship with that corporation. Out of such a relationship arises the duty of reasonably protecting the interests of the corporation. An officer of a corporate land exchange proponent cannot prepare the appraisals for the exchange, because such a person is not "impartial," within the meaning of 43 C.F.R. § 2201.3-1(a).

APPEARANCES: Tim Newcomb, Esq., Laramie, Wyoming, for Appellant; Terri L. Anderson, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management; Anthony T. Wendtland, Esq., Sheridan, Wyoming, for the Intervenors; and Dan Heilig, Esq., Lander, Wyoming, for the Wyoming Outdoor Council and Wyoming Wildlife Federation, amici curiae.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

John R. Jolley has appealed from a May 2, 1997, decision by the Wyoming State Director, Bureau of Land Management (BLM), dismissing Jolley's protest of the Decision Record and Finding of No Significant Impact (DR/FONSI), issued by the Bighorn Basin Resource Area Manager on March 6, 1997, adopting Alternative A of Environmental Assessment (EA) WY-018-EA7-55. Under that alternative, BLM would complete exchange WYW 138764 involving 6,934 acres of public land and approximately 2,379 acres of private land. The public and private lands are in Washakie County, Wyoming. In an order dated July 15, 1997, the Board granted a petition to stay the exchange pending the outcome of this appeal. BLM filed a motion to expedite consideration of this case. The motion is granted.

Hilston Ranch Realty and Wyo-Land Ranch Sales, Inc., acting through their respective presidents, Neal Hilston and John D. Sloan, formed a limited liability corporation, Great Western Land Exchange (GWLE), for the purpose of "the physical and market analysis and valuation of real property and the acquisition, disposition, and exchange of such real property and other related activities." (Statement of Reasons, Ex. 3, at 1.) The Articles of Organization for GWLE identified its two members as Hilston and Sloan. Id. at 2. By letter dated August 29, 1996, Hilston informed BLM, on behalf of GWLE, that certain individuals were interested in exchanging various private lands for public lands "within the boundaries of their ranches." He further stated that "Great Western Land Exchange is acting as the proponent in this proposed transaction."

The individuals referred to by Hilston and identified in the record as Robert Samuel, Charles Lewton, Kent R. Lewton, Arthur and Dixie Bjornstead, Derald W. Cheeney, and Maurice and Kathy Bush (collectively referred to herein as the "Landowners") sought to acquire public lands within their grazing allotments. Certain of the Landowners entered into an option to purchase tracts of private land owned by Coffman Ranch that BLM desired to acquire, including the 2,379 acres involved herein, and, during the pendency of this appeal, they exercised their option to purchase that property with the expectation that the exchange would be completed.

Approximately 5,390 acres of the BLM land proposed to be exchanged are in an area identified in the EA as the "Southern Sector." That area extends about 10 miles south from Big Trails, Wyoming, and is bordered on the west by the Nowood River and on the east by the Hazelton Road. (EA at 3-4.) An area designated as the "Northern Sector" includes approximately 1,544 acres about 15 miles south of Ten Sleep, Wyoming, in an area bordered on the north by the Rome Hill Road and on the southwest by State Highway 434, with much of the land in close proximity to the Spring Creek Road. (EA at 4.)

Wyoming Outdoor Council and the Wyoming Wildlife Federation also filed appeals of the DR/FONSI. In our order dated July 15, 1997, we dismissed those appeals because neither organization had filed a protest nor taken other action as a "party to a case" within the meaning of 43 C.F.R. § 4.410. We did, however, provide each of the organizations amicus curiae status. In that same order, we denied a motion filed by BLM to dismiss Jolley's appeal for lack of standing because Jolley alleged that he used the land in question for recreation, citing Sharon Long, 83 IBLA 304, 308-309 (1984).

On November 4, 1997, the Landowners filed a motion to intervene in this appeal and a motion to lift our stay, asserting that Jolley had not substantiated sufficient use of the lands for recreation to give him standing to appeal BLM's decision. By order dated November 15, 1997, we granted the motion of the Landowners to intervene in this appeal, but took the motion to lift the stay under advisement, declining to lift it at that time. In that order at page 2, we set forth the arguments of counsel for the Landowners regarding Jolley's alleged lack of standing:

> Counsel asserts that Jolley's unsubstantiated allegation of use of lands for recreation is a vague representation calculated to avoid identifying with specificity any of the particular lands he claims to have used or when or in what manner he used them. Counsel contends that, based on the present record in the case, Jolley "simply could not have used most of the public lands slated for inclusion in the Exchange." (Motion at 6). Counsel attaches affidavits from the Landowners attesting to the fact that Jolley never asked permission, prior to the proposed exchange, to access any of the public lands proposed for exchange that were surrounded by their private property.
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> We stated as follows:
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> > Regarding counsel's assertion of lack of standing, we find no requirement that a person challenging a decision to complete a multiple parcel exchange allege use of each parcel of public land proposed for exchange. Nevertheless, given the fact that Jolley's assertion of use has been challenged, we find that Jolley must provide more information regarding his alleged use of the public lands in issue in order to survive the Landowners' contentions regarding his lack of standing.

(Order at 2.)

[1] Under 43 C.F.R. § 4.410, "[a]ny party to a case who is adversely affected" by a BLM decision has a right to appeal to this Board. Clearly, the party seeking review must itself be among the injured, and the mere concern of an individual opposing a BLM action does not constitute a cognizable legal interest. An appellant must have a legally cognizable interest in the land at issue in order to be adversely affected; however, that interest need not be an economic or a property interest. Use of the land will suffice. Craig M. Weaver, 141 IBLA 276, 281 (1997); Kendall's Concerned Area Residents, 129 IBLA 130, 136-37 (1994), and cases cited therein. As we stated in our order, quoted above, a person challenging a multiple parcel land exchange need not allege use of each parcel of public land involved in the exchange in order to satisfy this Board's standing requirements.

[2] In response to our request for further information regarding his use of the public lands in question, Jolley presented an affidavit dated December 1, 1997, in which he states that he was born and raised in the Big Horn Basin area and that he has "recreated on many of the parcels of federal lands included in this exchange." (Jolley's Ex. 66, at 3.) 1/ He

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1/ Jolley also filed a motion to reconsider our order to the extent it granted intervenor status to the Landowners. That motion is denied. Clearly, the Landowners would be adversely affected by action of this Board overturning BLM's decision. The purpose of the exchange was for the Landowners "to acquire public lands within their respective BLM grazing allotments." (EA at 2.)

lists his recreation as deer hunting, hiking, picnicking, constellation observing, and camping. He details activities on specific parcels during time periods ranging from the 1950's through the 1990's. He states that he has hunted mule deer on Parcels 27, 37, 38, 39, 40, 41, and 42. He specifically recalls killing a deer on Parcel 41 while hunting with his grandmother in October 1959. He states that he "spent numerous days in the summer of 1980 or 1981 traveling the Nowood road and specifically hiked over parcels 41 and 42 along with the adjoining thousands of acres of other federal public lands." (Jolley's Ex. 66, at 4.) He further states that in the spring of 1990 he picnicked with this grandmother on lands included in Parcel 37, whose eastern boundary is the Spring Creek Road, and that he hiked on that parcel in June 1995. Id. Finally, Jolley states: "Although I have referred to specific years or months in order to meet the tests of specificity, there were many other times that I hiked, picnicked, hunted and recreated upon the public lands in question." Id. at 5.

The Landowners contend Jolley's allegations of use are "totally and conveniently uncorroborated." (Intervenors' Response to Jolley's Response to Nov. 17, 1997, Order (Landowner's Response) at 16.) Moreover, they question the veracity of those allegations, characterizing them as "contrived and untrue." Id. As support for their general assertion regarding untruthfulness, the Landowners point to paragraphs 4 and 5 of Jolley's affidavit (Jolley's Ex. 66), in which they state he "claims he can access parcels such as those he labels as Parcels 3, 4, 6 and 7 [which are completely surrounded by private lands]; he asserts he has done so without trespassing and without permission from any surrounding private landowners." Id. at 16. The Landowners assert that "it is not physically possible for anyone to access these four parcels without permission from Landowners * * *." Id.

The Landowners' example is based on three separate statements by Jolley in his affidavit. Therein, he first states that he has not sought permission from the Landowners to recreate on their land because he had not used their private lands for recreation. Next, he states that he did not trespass on the Landowners' private land to access the public lands. Later, he states that "to the best of my recollection, it is my belief that in the summer of 1954 or 1955, I spent several days on federal public lands parcels 3, 4, 6, and 7 while visiting sheep camps with my mother." (Jolley's Ex. 66, at 5). The Landowners extrapolate this claim of use of landlocked public lands to embrace all Jolley's assertions of use and dismiss them all as "simply untrue." (Landowners' Response at 14.) Thus, the Landowners seek a ruling from this Board that Jolley's affidavit is unreliable and does not support standing to maintain his appeal.

Even assuming the Landowners have uncovered an incident of illegal access in 1954 or 1955, 2/ it hardly undercuts Jolley's other allegations

2/ As pointed out by counsel for Jolley, regarding the Landowners' example: "It would be highly unusual for an 11 year old boy to be the one to obtain permission to cross private lands in a circumstance such as this. Common sense only dictates that the parent would have been the one to have

establishing a life-long history of utilizing some of the public land parcels involved in this exchange for recreational purposes. If these public land parcels are transferred to private ownership, Jolley's opportunity to use and enjoy these public lands will be adversely affected. Jolley has satisfied the standing requirements established by this Board's decisions. See, e.g., Howard G. Booth, 134 IBLA 300, 301 n.1 (1996); Southern Utah Wilderness Alliance (On Reconsideration), 132 IBLA 91, 92-93 (1995); National Wildlife Federation, 82 IBLA 303, 307-08 (1984).

In his appeal, Jolley raises a number of procedural issues. First, he alleges that BLM did not provide proper notice of the proposed exchange because it should have taken into consideration the fact that Wyoming is a sparsely populated state and published notice in the only Wyoming newspaper with state-wide circulation, the Casper Star Tribune. He argues that, because the first notice to the public that only 2,379 acres of private lands would be acquired was when the DR/FONSI was issued, notice of the exchange should have been republished. He also asserts that completion of the exchange would violate the final environmental impact statement for the Washakie Resource Area Resource Management Plan (Washakie RMP) because 26 of the public land parcels proposed for disposition in the exchange are not listed in that document as candidates for disposal.

We find little merit in these objections. Under 43 C.F.R. § 2201.2, BLM is required to publish a notice of a proposed exchange "once a week for 4 consecutive weeks in newspapers of general circulation in the counties in which the Federal and non-Federal land or interests in lands proposed for exchange are located." (Emphasis added.) BLM published notice in accordance with that regulation. Failure to publish the notice in a newspaper of wider circulation, such as the Casper Star Tribune, does not provide a basis for reversing BLM. Nor does the fact that some of the private land initially described in the notice was dropped from the exchange require republication. The regulations expressly provide that "[t]he authorized officer is not required to republish descriptions of any lands excluded from the final exchange transaction, provided such lands were identified in the notice of exchange proposal." 43 C.F.R. § 2201.2(c). There is no allegation that the notice of exchange proposal failed to include the lands presently at issue. Moreover, even where deficiencies may occur, we have held that they provide no basis for reversal where they have not prejudiced a particular appellant. Santa Fe Pacific Railroad Co., 90 IBLA 200, 219 (1986).

Finally, we have held that the fact that parcels to be exchanged have not been specifically identified in a land use plan does not preclude BLM from offering them. National Wildlife Federation, 87 IBLA 271, 275 (1985). In this case, nothing in the Washakie RMP precludes the disposal of any

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fn. 2 (continued)
obtained any permission, if needed, not the child." (Motion to Strike Intervenors' Final Supplemental Response at 12.) Moreover, counsel states that one of the Landowners who asserts that permission was not sought did not own any private land adjoining Parcels 3, 4, 6, and 7 in 1954 or 1955.

of the public lands at issue. The Record of Decision for the Washakie RMP provides that proposed exchanges will be evaluated on a case-by-case basis utilizing the land disposal criteria in Appendix B of the RMP. (BLM's Consolidated Response, Ex. L.) That Appendix includes the statement that "[d]isposal for exchange may cause the foregoing criteria and items for consideration to be modified if the unique qualities of the lands acquired offset the quality of the lands transferred." Id. BLM asserts that it determined through its EA process that unique qualities of the land to be acquired offset the qualities of the land designated for disposal.

[3] Not so easily dismissed, however, is Jolley's allegation that the person who conducted the appraisals relied on by BLM was not impartial, as required by 43 C.F.R. § 2201.3-1(a). The regulation, 43 C.F.R. § 2201.3-1(a) provides that the appraisal of the Federal and non-Federal properties involved in the exchange must be conducted by a "qualified appraiser * * * who is competent, reputable, impartial, and has training and experience in appraising property similar to the properties involved in the appraisal assignment." (Emphasis added.) We further note that Departmental regulation 43 C.F.R. § 2200.0-5(a) defines "appraisal or appraisal report" as "a written statement independently and impartially prepared by a qualified appraiser."

In the "Summary Appraisal Report - Complete Appraisal," prepared by Hilston for the BLM lands (Public Lands Appraisal Report), he states that he inspected 42 parcels of public land, ranging in size from 40 acres to 648.64 acres, on July 18, 1996, and concluded that the value of the 6,943 acres included in those parcels was $715,524. 3/ According to the

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3/ In that Report, the legal description for each of the 42 public land exchange parcels includes land within only one section, whether or not the land within that section is contiguous. Thus, for example, Parcel 12 contains 160 acres consisting of two noncontiguous 80-acre tracts of land within sec. 31, T. 43 N., R. 86 W., sixth principal meridian, the N½NE¼ and the E½SE¼. On the other hand, contiguous lands in different sections received separate parcel numbers. For example, the largest individual parcel, Parcel 3, containing 648.64 acres, forms a much larger contiguous parcel with Parcels 4, 6, 7, 8, and parts of 9 and 11. That large parcel contains more than 2,400 acres. Thus, the method of description used in the Public Lands Appraisal Report fosters the impression that the lands to be transferred are all relatively small tracts of land. The Wyoming BLM Chief State Appraiser recognized this in a memorandum to the Big Horn Basin Area Manager, BLM, styled "Appraisal Review Great Western Land Exchange (Selected Lands)," dated Mar. 6, 1997, at 3: "The appraiser identified each separate legal description as a `parcel' for valuation purposes. However, some of these `parcels' are adjacent to one another. Hence, there [are] only 21 actual separate parcels of land. These parcels of land range in size from 40 acres to over 2,000 acres." (Government's Consolidated Response, Agency Ex. U.) The Chief State Appraiser's description of the parcels was not included in the EA, the DR/FONSI having been issued the same day as his memorandum, Mar. 6, 1997.

"Summary Appraisal Report - Complete Appraisal" for the private lands (Private Lands Appraisal Report), Hilston inspected 3,660.43 acres of private lands on July 19, 1996, and concluded that the value of that acreage was $1,090,940. Based on the appraisals, BLM determined that approximately 2,379 acres of private land would be required to equalize the value of the 6,934 acres of public land. (EA at 2.) 4/

The EA describes the public lands proposed for disposal as "either small, isolated, or unmanageable lands, most of which do not have legal access. Those that have legal access contain only limited acres of public land with no known overwhelming benefit to the public or have difficult access because of physical or topographic constraints." (EA at 1.) As we stated at page 6 of our July 15, 1997, order, Jolley identified some notable exceptions to this characterization:

> In reply, Jolley provides a map of the 42 public lands parcels, designating each by number (Reply, Ex. 33), and a detailed explanation of why the proposed exchange does not result in a consolidation of public land, contending that 18 parcels of selected lands are being severed from existing blocks of public lands. For example, Jolley states:
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> > Parcels 41 and 42 (approximately 151 acres) are choice roadside frontage public lands, which are a part of a 6,000 acre consolidated tract that are being severed from an existing consolidation. These are choice lands, not only because of roadside access and access to other public lands, but also because parcel 41 has river frontage.
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> (Reply at 9).

Even a cursory examination of the map of the parcels (Jolley's Ex. 33) shows that many of the parcels are being separated from larger, and in some cases, much larger, blocks of public land. See Parcels 1, 2, 14, 15, 16, 17, 18, 27, 31, 32, 33, 34, 36, 38, 39, 40, 41, and 42. The Public Lands Appraisal Report divides a contiguous parcel of approximately 1,135 acres into Parcels 1, 2, 14, 15, and 16. The northern boundary of one of those parcels, Parcel 14, narrowly adjoins an area of over 2,500 acres of public

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4/ On July 17, 1996, two of the Landowners, Charles Lewton and Robert Samuel, entered into an option to purchase 3,660.43 acres of land owned by Coffman Ranch, the same land inspected by Hilston 2 days later. Nevertheless, when GWLE proposed an exchange to BLM, it proposed transferring all or part of approximately 7,779 acres of private land for all or part of approximately 6,934 acres of public land. These are the acreage figures included in BLM's notice of exchange proposal first published on Oct. 4, 1996. There is no evidence in the record that Hilston ever appraised the additional private land included in the notice of proposed exchange.

land, which is crossed by a public road, and from which the 160-acre Parcel 27 is being severed.

In response to Jolley's charge of impartiality, BLM points out that Hilston is a professional appraiser with high qualifications. Appraisers are required, BLM states, to certify that they have no present or prospective interest in the property and that they are not compensated based on the calculation of a predetermined value that favors the paying client. BLM asserts that Hilston made this necessary certification in this case. BLM states that appraisals are commonly conducted for a flat fee, as was done in this case, to ensure the integrity of the process, and that Hilston received $5,000 to complete the public lands appraisal and $5,000 for the private lands appraisal. "Consequently, there is no monetary benefit that can accrue to Mr. Hilston based on the value of the land." (Government's Consolidated Response at 3.)

The implication of these arguments is that, because Hilston is a professional appraiser, with high qualifications, who received a flat fee for each of the appraisals, there is no issue of impartiality. In our July 15, 1997, order granting Jolley's petition for stay in this case, we expressed our "particular concern" about "appraiser Hilston's status as one of two members of GWLE, the exchange proponent." (Order at 6.) We also stated that "[r]egardless of his professional credentials, impartiality is clearly an issue." Id. Thus, while a disqualifying interest may not arise out of the arrangement for Hilston's appraisal fee, our concern is his involvement as a principal of GWLE.

[4] We have no reason to doubt Hilston's professional credentials as an appraiser. However, in order to be "impartial," an appraiser must be "disinterested." See Black's Law Dictionary, 752 (6th. ed. 1990). The word "disinterested" is defined as follows:

> Not concerned, in respect to possible gain or loss, in the result of the pending proceedings or transactions. Not having any interest in the matter referred to or in controversy; free from prejudice or partiality; impartial or fair minded; without pecuniary interest; not previously interested; not biased or prejudiced.

Id. at 468.

Although BLM asserts that, in accordance with 43 C.F.R. § 2201.3-1(a), a qualified appraiser may be an employee or contractor of the non-Federal exchange party, such an employee or contractor must still be impartial, i.e., he or she cannot have a predisposition in favor of or against the exchange. Furthermore, he or she cannot have any pecuniary interest in the property to be exchanged. Nor can the approval or denial of the exchange have any pecuniary effect on him or her.

Herein, Hilston is not merely an employee or contractor of the non-Federal exchange party; he is president of Hilston Ranch Realty, one of

the two principals who created GWLE, and one of the two members of GWLE. On August 1, 1996, Hilston signed GWLE's "Agreement to Initiate a Land Exchange" with BLM as Secretary of GWLE. The Agreement identifies GWLE as the proponent of the exchange and "certifies" that the proponent has "legal ownership or control of the non-Federal lands."

In its response, BLM explains the involvement of GWLE and the fee arrangement with Hilston:

> As the exchange proponent, Great Western Land Exchange has a financial interest in the completion of the exchange. The Federal Land Exchange Facilitation Act of 1988 provides for the use of Assembled Land Exchanges to facilitate exchanges and reduce costs. These types of exchanges involve consolidating numerous parcels of Federal and non-Federal land into packages for exchange. These packages are conceptually developed and consummated by exchange proponents in concert with the BLM. * * * They work with various involved private parties, BLM, and others to expedite and negotiate the exchange package. They make a profit as a result of this effort. This is the reason for the $10/acre reimbursement by Lewton and Samuel. It provides the monetary incentive for Great Western Land Exchange to facilitate the assembled land exchange. It is a service to both the private parties involved and BLM, and it would be naive to expect them to perform this service for free.

(Government's Consolidated Response at 28.)

While organizations such as GWLE may provide valuable assistance to landowners and BLM in "packaging" parcels for an exchange, the issue presented in this case is whether an individual, who is an officer of the proponent of the exchange, can also conduct the appraisals upon which the exchange is to be based.

[5] BLM's explanation, rather than providing a basis for affirming its decision, supports setting it aside. We have previously observed: "A corporate officer or director stands in a fiduciary relationship to his corporation. Out of this relationship arises the duty of reasonably protecting the interests of the corporation." June Oil and Gas, Inc., 41 IBLA 394, 399-400, 86 I.D. 374, 377 (1979), aff'd, 506 F. Supp. 1204 (D. Colo. 1981), aff'd, 717 F.2d 1323 (10th Cir. 1983), cert. denied, 466 U.S. 958 (1984), quoting Alvest, Inc. v. Superior Oil Corp., 398 P.2d 213, 215 (Alaska 1965).

What BLM overlooks is that Hilston's status as a corporate officer of GWLE gives him a stake in the outcome of the exchange, for which GWLE is to receive a fee of $10 per acre for each acre of public land involved

in the exchange (Jolley's Ex. 56), that precludes him from being "impar tial" under any recognized definition of that term so that he cannot perform the appraisal in addition to his other functions in facilitating the exchange. 5/

This point is sufficiently free from doubt that it has been seldom litigated, but a few cases that have considered the issue make it clear that even interests less direct than that of Hilston may disqualify an individual from conducting an impartial appraisal. In one case, for example, Schwartzman v. London & Lancashire Fire Ins. Co., 2 S.W.2d 593, 594 (Mo. 1927), the court concluded that an officer of an investment company, who was appointed the umpire on an appraisal committee to appraise a fire loss, was not disinterested, and it voided the appraisal because certain employees of the officer's company were appointed agents of an insurance company that was a party to the transaction. The disqualifying link, the court held, was the pecuniary interest the officer derived from being a stockholder of the investment company, who was entitled to receive dividends, which necessarily included earnings from business developed by the agents of the insurance company. See also Orr v. Farmers Mutual Hail Ins. Co. of Missouri, 201 S.W.2d 952, 956-57 (Mo. 1947). 6/

The Landowners assert that BLM's appraisal should not be overturned because Jolley failed to submit an appraisal in rebuttal. Jolley at one time asserted that he would submit an appraisal in support of his position; however, he later informed the Board that he would not. We have held that in the absence of compelling evidence that a BLM appraisal is erroneous, such an appraisal generally may be rebutted only by another appraisal. E.g. Mallon Oil Co., 104 IBLA 145, 150-51 (1988); Dwight L. Zundel, 55 IBLA 218 (1981). Nevertheless, even when rebutting appraisals have not been submitted, we have set aside appraisals where error in the appraisal methods has been demonstrated. In Thomas L. Sawyer, 114 IBLA 135, 139-40

5/ Jolley also points out that under the terms of an agreement between GWLE and two of the Landowners, Charles Lewton and Bob Samuel, if the exchange is not completed, "but Samuel and Lewton exercise their option and purchase the Coffman property, Neal Hilston and John Sloan dba as Great Western Land Exchange will reimburse Samuel and Lewton" for one-half of the expenses of the archaeological survey conducted on the Samuel and Lewton ranches. (Jolley's Ex. 56.)

6/ The Schwartzman decision included a dissenting opinion; however, the dissent did not disagree with the majority regarding the necessity for the impartiality of an appraiser. The dissent stated:

"The fairness and impartiality of an appraiser should be, like that of a juror, not only above reproach, but above suspicion. * * * [The officer of the investment company] may be acquitted of any wrongful intent, yet he knew of the relation of his company to the insurance company at the time of his appointment. Unquestionably, his interest and relation to his principal would have disqualified him as a juror in an action on the policy."

2 S.W.2d at 602-603.

(1990), for example, we set aside a BLM appraisal of rental for a land use permit because we found that it was not based on comparable transactions. In this case, Jolley has established that the appraisals were not conducted by an impartial appraiser. Under such circumstances, the submission of an appraisal to combat valuations is unnecessary.

BLM also contends that review of the Hilston appraisals by the Wyoming BLM Chief State Appraiser and his approval thereof satisfies any concerns regarding the appraisals. We disagree. The documents submitted to the BLM appraiser must meet the definition of an appraisal set forth in 43 C.F.R. § 2200.0-5(c). An appraisal or an appraisal report is defined as "a written statement independently and impartially prepared." In this case, the documents prepared by Hilston do not satisfy that definition. Moreover, we note that the Chief State Appraiser did not complete his review and approval of Hilston's appraisals until March 6, 1997, the same day the Area Manager issued his DR/FONSI. (BLM's Consolidated Response, Ex. U; see note 3, supra.)

The appraisals in this case were performed by an appraiser who cannot objectively be considered to be impartial. Therefore, his appraisals cannot be utilized to support the exchange. Accordingly, we must set aside the decision denying Jolley's protest and the underlying decision approving the exchange and remand the case to BLM. Should the parties desire to proceed with an exchange, BLM must insure that the appraisals are conducted by an appraiser meeting all the qualifications of 43 C.F.R. § 2201.3-1(a). 7/

The motions to lift the stay in this case are denied as moot. Jolley's request for a hearing is denied. Jolley's motion to strike the Landowners' Final Supplemental Response is denied.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is set aside and the case remanded to BLM.

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Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

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James P. Terry
Administrative Judge

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7/ Jolley also contends that Hilston incorrectly determined the highest and best use of the public land to be plottage to a ranching operation and failed to consider the rapidly escalating value of rural land in Wyoming. The highest and best use of the public land will be determined by the appraiser who conducts any subsequent appraisal